♦ **3(A) OPEN MEETING REQUIREMENT, GENERALLY: PUBLIC BODY TO TAKE REASONABLE STEPS TO ENABLE OVERFLOW CROWD TO HEAR THE MEETING**

***Topic numbers and headings correspond to those in the Opinions Index (2014 edition) at** http://www.oag.state.md.us/Opengov/Openmeetings/OMCB_Topical_Index.pdf

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May 19, 2016

Re: Board of Education of Howard County
Colleen Morris, *Complainant*

Complainant Colleen Morris alleges that the Board of Education of Howard County ("school board") violated the Open Meetings Act with regard to the logistical arrangements that the school board made for its February 4, 2016 meeting. The school board, by its attorney, denies that it violated the Act.

Complainant states that she was not admitted to the room in which the school board met. She alleges that school system employees were given preferential seating in that room, that the overflow room where she sat was inadequate because the audio provided in that room was hard to hear over an ice machine, and that the school board should have met in a nearby elementary school's cafeteria, which, she states, would have held more people. She also alleges that the outside door to the building was locked at some point during the evening.

The school board denies that preferential seating was given to school system employees, states that no one in Complainant's overflow room complained about the sound to the school system employee assigned to that room and that he could hear, describes its preparations for an overflow crowd, and explains how the door came to be locked. The Complainant and the school board have submitted detailed affidavits to dispute each other's conclusions.

Discussion

We begin with the matter of the locked door. The relevant facts are as follows: the meeting began at 4 p.m., with the agenda item—the renewal of

the superintendent's contract—that was expected to draw a crowd. After the school board addressed that topic and heard public comments, many people left. At about 5:30, the custodian, assuming that the first agenda item was the only one that was likely to interest the public, decided on his own initiative that the main entry door to the building should be locked for security reasons, and he did so. There is a bell next to the door, with a sign that tells people to ring it after hours so that the custodian can let them in. Complainant left the meeting and went outside. Aware that the door would lock behind her, she tried to prop it open, ultimately without success. She banged on the door and rang the bell. Someone in the hall saw that she was locked out and let her back in. The custodians heard the bell and also came. The school board and the custodian state that no one instructed the custodian to lock the door, and the school board states that it will not happen again.

The Act states the policy that "meetings of public bodies shall be held in places reasonably accessible to individuals who would like to attend these meetings." § 3-102(c).[1] Under these circumstances, we find that the meeting was reasonably accessible. The result has been different for public bodies that lock the public out entirely, *see, e.g.*, 8 *OMCB Opinions* 188 (2013), but that was not the case here. Here, people who came to the meeting relatively on time–within the first 90 minutes—could simply walk in. People who came later had to ring the bell and wait for the attendant. So long as a public body does not unreasonably delay the admission of later arrivals, or the re-admission of people who leave, we will not second-guess its security measures.

We turn next to Complainant's allegations about the adequacy of the overflow room. Most of the basic facts are undisputed. The school board regularly schedules meetings in its usual board room, which, when expanded, holds over 100 people, and adds overflow rooms, with television monitors, when a large crowd is expected. The staff expanded the board room and prepared three overflow rooms for the February 4 meeting. Two were in the same building as the main meeting room; the third was in a different building and was not used. The overflow room to which Complainant was directed, the "Café," contains an ice machine. According to a school board member's husband, "it was frequently difficult to hear" the meeting from the Café and "not possible to hear what was going on inside the Board Room that was not being said directly into a microphone." He could not hear "outbursts coming from the audience" and could not see who interrupted his wife while she spoke. Another affiant states that he has watched meetings from the Café in the past and once unplugged the ice machine so that he could hear better. He has found it "difficult or impossible to hear" the meetings in both overflow

[1] Statutory references are to the General Provisions Article (2014, with 2015 supp.) of the Maryland Annotated Code.

rooms because of "running machines and people talking in the hallways of the building." On February 4, he was not in the Café; he had arrived at about 3:45, in time to be seated in the main meeting room. The school system's security coordinator, who watched the meeting from the Café, states that the ice machine was humming but did not interfere with his ability to hear the meeting. No one complained to him that they could not hear. The school board used the Café as overflow space at a subsequent meeting; no one complained that they could not hear.

Some basic facts are absent. We have no facts about the adequacy of the other overflow room that night, no indication that any of the people who could not hear well asked the security coordinator to take them there or turn off the ice machine, and no facts about whether the public had complained about either overflow room on earlier occasions.

The Act provides: "Whenever a public body meets in open session, the general public is entitled to attend." § 3-303(a). To comply with these openness mandates, we have advised, public bodies must choose meeting spaces that will accommodate the number of people that the public body can reasonably expect to attend. 3 *OMCB Opinions* 118, 120 (2001). Conversely, a public body violates these mandates if "the public body knew that the size of the meeting space would preclude members of the public from observing the conduct of public business." 9 *OMCB Opinions* 296, 300 (2015). A public body should move the meeting to a larger space when "a larger room is readily available, a request is made that the meeting be moved there, and moving the meeting would not interfere with the public body's ability to conduct its business." 3 *OMCB Opinions* at 121. That decision, we have said, lies within the discretion of the public body. *Id*. at 120.

We have recently found that a public body may accommodate an unexpectedly large crowd by moving a loudspeaker into the hall outside of a meeting room. 10 *OMCB Opinions* 18 (2016). Otherwise, we have not given much guidance on the use of overflow space, so we will borrow as a rule the common-sense advice of the Tennessee Attorney General: A public body that expects an unusually large audience should "take reasonable steps to enable the overflow crowd to hear the meeting." Tenn. Op. Att'y Gen. No. 12-109 (Dec. 14, 2012).

Certainly, a public body may not use the size of its meeting space or the logistics of its overflow spaces as an excuse to meet out of the public eye. Here, it would be difficult to conclude that the school board endeavored to meet out of the public eye; the meeting was streamed live to anyone who cared to watch it. That leaves the question of adequacy of the school board's logistical arrangements—specifically, whether the school board violated the Act by scheduling the meeting in its building instead of at the elementary school and whether the school board failed to take reasonable steps to enable

the overflow crowd to hear the meeting. As to the location, the submissions do not provide a basis on which to find that the school board abused its discretion with regard to its choice of a meeting space. For example, it is not for us to decide, as Complainant urges us to do, that the school board could easily have used the elementary school cafeteria for its 4 p.m. meeting because the school day there ended at 2:15. As for the reasonableness of the overflow arrangements, we again note the absence, in the many facts presented to us, of any complaint to the school board about the use of the Café as overflow space at earlier meetings, or to the attendants during the meeting. It also appears that no one asked the security coordinator to turn off the ice machine or admit them to the other room. Without some indication that it was unreasonable for the school board to follow its usual routine for overflow space, we find that the school board did not violate the Act in this regard.[2]

Finally, we turn to the allegation that the school system employees were given preferential seating in the main meeting room in order to exclude the general public from that room. The facts on this issue are mostly disputed, but Complainants' affidavits establish that, at 3:45, fifteen minutes before the meeting began, there were still empty seats in the main meeting room, and people who arrived at around that time were able to find seats, apparently without regard to whether they were school system employees. Also, members of the audience in the main room occasionally disrupted the meeting with remarks and other sounds that variously approved and disapproved the school board's actions. And, at the conclusion of the general comment period, many people left the main room, and people from the overflow rooms were admitted.

Beyond those facts, there is debate. Complainant, who arrived at the school board's building at 3:57 p.m. and was directed to the Café, alleges that an email posted on Facebook instructed school system employees to attend the meeting. The affidavits that Complainant submitted state that school system employees were overheard asking for admission because they

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[2] We did not find authorities for the proposition that a public body that meets publicly violates the Act when some members of the public must be directed to an overflow space from which they cannot hear well. Courts have generally focused on whether the public body intended to meet secretly rather than whether the logistical arrangements turned out to be adequate for everyone who wished to attend. In *Sovich v. Shaughnessy*, 705 A.2d 942, 946 (Pa. Commw. Ct. 1998), for example, the plaintiffs "maintain[ed] that the microphone and speaker were inadequate, that extraneous noise made it difficult to hear Council's proceedings and that the people in the overflow facility repeatedly asked Council members to speak louder and more clearly into the microphone." The court held: "Despite these difficulties, we do not believe that [plaintiffs'] assertions constitute a violation of the Sunshine Act." *Id*.

were told that they needed to attend and that those employees were admitted when members of the general public were directed to overflow space. Also, Complainant states, seats were given to the school board's counsel and the superintendent's guests, whose presence, she states, was unnecessary to the school board's business. From these allegations, Complainant infers that the school board intended to pack the meeting with supporters of the school board's position on the superintendent's contract.

The school board denies any intent to pack the meeting room with its supporters. The employee who wrote the email that was posted on Facebook states that she sent it to her staff of four employees and does not know who posted it. The security coordinator and other employee who were in charge of crowd control state that no one told them to give preference to school system employees and that school system employees were also directed to the overflow spaces when the main room was full.

Although we are unable to weigh evidence and resolve factual disputes, some conclusions emerge. First, school system employees as well as members of the general public wanted to attend this meeting. Second, people who came early found seats in the main meeting room. Third, some employees arrived later and gained admission by saying that they had been told to attend. Fourth, we do not know whether these employees were there to assist the school board with other agenda items, were the intended recipients of the email instruction, had reacted to the Facebook posting, or had received any instruction at all, or, for that matter, whether the employees who attended supported the action that the school board apparently was expected to take. Fifth, there are no facts to suggest that the school board members themselves were involved in crowd control. And, sixth, the presence of many school system employees in the main room gave the appearance to Complainant and others that the school system was trying to pack the audience with supporters of the superintendent.

In light of the fact that members of the general public who arrived fifteen minutes early could find seats, we do not find that the school board excluded the general public from the main room. Also, we do not think it odd that a school system's employees might be interested in the school board's action on a superintendent's contract, and so we do not adopt as undisputed any inference that the employees were there in order to keep the public out. Nonetheless, one of the main purposes of the Act is to "increase the faith of the public in government," § 3-102(b), and it may well have been that the school board should have taken some measures to ensure, and to assure the public, that its seating was "first come, first served." [3]

[3] We do not suggest that the school board has a duty to exclude school system employees in order to admit more members of the general public to the meeting room; the Act does not afford to public employees any lesser right to observe public

Conclusion

As explained above, this is not a case of a public body trying to conduct business out of the public eye; the school board made live streaming video of this meeting available to the public and provided seats in the main meeting room to members of the general public. This complaint focused more on the understandable desire of Complainants and other members of the public to be in the main meeting room with the public body, both to better observe the meeting and to convey their position to the school board by their presence.[4] We find that the alleged inadequacy of one of the overflow rooms did not rise to the level of a violation of the Act; that the school board did not exclude the general public from the main meeting room, given that those who arrived fifteen minutes early found seats; and that the locking of an exterior door midway through the meeting did not violate the Act, given the bell and availability of staff to answer it.

Open Meetings Compliance Board

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business than the right afforded to everyone else. Absent an intent to exclude the public from a meeting, it could be problematic for a public body to exclude public employees from an open meeting solely because of that status. For example, we have advised that public bodies may not exclude reporters in order to admit the general public; in 9 *OMCB Opinions* 290, 291 (2015), a town council violated the Act by excluding reporters from the main meeting room in order to admit town residents. Still, a public body might consider asking its employees, when those employees do not have a function at a meeting, to volunteer their seats to members of the public in an overflow room.

[4] We have not addressed Complainant's allegations and materials on whether the meeting was managed in such a way as to enable supporters of some board members' votes to speak out as often as supporters of the votes of the majority of the board members. The Act entitles the public to observe the conduct of public business. *See* § 3-303 (entitling the public "to attend" meetings). Although other laws might give the public the right to speak at a particular public body's meetings, the Act does not. The Act also does not regulate the way in which a presiding officer manages public participation.